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case. Some courts hold that such an omission is ground for a new trial. *Messner v. The People, supra;* while others hold that such an omission is not a ground for a new trial, but the verdict must stand, the case to go back to the *nisi prius* court for the purpose of making the inquiry referred to, and then to pronounce sentence. In *State v. Hoyt, supra,* the court said: "Upon principle it can be no ground for a new trial. There was no mis-trial. The error (if any) did not enter into or in any manner affect the verdict: so that the verdict must stand; and if judgment should be arrested or set aside, the case should go back to the Superior Court to be proceeded with from the point where the error intervened, that is, the court would be called upon to make the inquiry referred to, and then pronounce sentence again." It seems that the preponderance of authority is in accord with the above case. *State v. Johnson,* 67 N. C., 59; *Keech v. The State,* 15 Fla., 591; *Kinsler v. Wyoming Territory,* 1 Wy. Ter., 112.

IS THE SAME DEGREE OF CARE REQUIRED OF THE OWNER OF A PASSENGER ELEVATOR AS IS REQUIRED OF A COMMON CARRIER?

It seems that the modern inclination of courts is to hold owners of passenger elevators to the same degree of care as common carriers, and yet there are a few holding, with what seems to be sound reasoning, to the contrary. At least, there is sufficient diversity of opinion on the subject to make the topic of practical interest.

In discussing this question, it would be well to bear in mind the status and relation of common carriers and passenger elevators to the public. The chief difference between the two is this: there does not exist any prior or antecedent relation between the common carrier and passenger; but, in the case of passenger elevators, there does exist an antecedent relation. A common carrier holds itself out to carry all who may rightfully apply for carriage; but a passenger elevator only holds itself out to carry those who are tenants of the building, or guests of the hotel, who have, in reality, purchased the elevator privilege. As there exists this difference in these two carriers why should not there exist a difference as to their liability to their passengers?

The case of *Quimby v. Bee Building Co.,* 127 N. W. (Neb.), 118, recently presented itself in the Supreme Court of Nebraska,

and that court laid down the rule, that any one who installs an elevator in his building for the use of his tenants and the public generally, is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers.

The Federal courts have definitely settled this question in the case of *Marker v. Mitchell,* 54 Fed., 637, which lays down the principle that a landlord running an elevator is charged with "the highest degree of care consistent with the possibility of injury," commensurate with or proportionate to the possibility of injury. Judge Taft, agreeing with the Federal rule, in *Treadwell v. Whittier,* 80 Cal., 574, says: "Persons operating passenger elevators are to be treated as carriers of passengers, and the same duty rests upon them as to care and diligence, as upon carriers of passengers by railway." In *Gardsell v. Taylor,* 41 Minn., 207, the above doctrine is virtually reiterated by the presiding judge, who held that the same degree of responsibility rests upon elevator owners as upon common carriers. In Illinois the injury of a passenger in an elevator immediately raises the presumption of negligence and want of care. *Hartford Deposit Co. v. Sollett,* 172 Ill., 222; *Fraser v. Harper House Co.,* 141 Ill. App., 390. And this Illinois court goes further, in its ruling in the *Chicago, etc. Railroad Co. v. Arnol,* 144 Ill., 261, by drawing an analogy between operators of freight elevators and of freight trains, as common carriers. The learned judge says there cannot be the same immunity from peril in travelling on a freight train as on a passenger train, but the same degree of care can be exercised, and the liability of operators of freight elevators is covered by the same rule and degree of diligence as a passenger elevator.

The Supreme Court of Arkansas, in *Sweden v. Atkinson Improvement Co.,* 125 S. W. (Ark.), 439, holds with very good reasoning that an elevator does not have to serve the public as a common carrier, and is for the use of the hotel patrons only, yet the law imposes the same duty upon the owner as is exacted from common carriers. It was so held in the *Kentucky Hotel Co. v. Camp,* 97 Ky., 424, that the highest degree of care and skill usually exercised by prudent men in the same business was the rule. Also, the *Southern Bldg. and Loan Ass'n v. Lawson,* 67 Tenn., 367, agrees with the Kentucky rule.

In *Griffin v. Manice,* 166 N. Y., 188, on the other hand, the principle is laid down with great emphasis that the highest degree of care and foresight is not required of elevator owners, but only reasonable care. This case is sustained by *McGreel v. Buffalo Office Building Co.,* 153 N. Y., 265, and *Biddiscomb v. Cameron,* 35 N. Y. App., 563, both holding that an elevator owner is liable only to the extent of reasonable care. Also, in *Kaye v. Rob Roy Hosiery Co.,* 51 Hun (N. Y.), 519, it was said that the falling of an elevator which had been successfully used daily, with no reasonable cause of apprehension of defect, would allow no recovery from a person injured in it.

Numerous text-writers have commented upon this queston, and they seem well divided as to the amount of care exacted from elevator owners. *Shearman and Redfield on Negligence,* Sec. 704-719, lays down a rule quite different from any other, saying that an occupant of premises is bound to use ordinary care and diligence to keep such in a safe condition; that the mere fact of the existence of elevators is no evidence of negligence, and the owner of the elevator is only liable for that injury which reasonable care and vigilance would have prevented. However, *Goddard's Outlines of Bailments and Carriers,* p. 609, and *Hutchinson on Carriers,* Sec. 100, hold contrary to the above view, citing numerous cases to sustain their holding.

In a very strong case, *Burgess v. Stowe,* 134 Mich., 204, Justice Carpenter is quoted as saying that "an elevator operator is not bound to exercise the highest degree of care and diligence of a cautious person so far as human foresight can go," but is only required to exercise the care of an ordinarily prudent man under the circumstances. This learned judge reviews numerous cases, and New York cases which pertinently rule, "that the stairway is always open to those who deem this degree of diligence inadequate for their protection." It might be added in view of the above statement, that elevators are merely substitutes for stairways, yet it would be highly impracticable and inexpedient to hold the keeper of a stairway with the same degree of care as a common carrier. But, there are buildings with moving stairways, which answer the purpose of elevators, and since this stairway is in fact, though not in form, an elevator, one is tempted to ask would a court be justified in holding the owner of such a stairway with a common carrier's liability. Such a case is yet to be decided, but

should it arise, it would present several novel features not heretofore settled.

It is contended in *Edwards v. Mfg. Bldg. Co.*, 27 R. I., 248, that a landlord owning an elevator is not a common carrier, nor is he bound by the same degree of care that is imposed upon common carriers, but must exercise only reasonable care for the safety of those who enter his premises. He is not like a common carrier, but his duties are limited to those who have contracted with him for the use of his premises, or those who have business with his tenants. The above view is also held in *Shattuck v. Rand,* 142 Mass., 83.

In conclusion, it might be said that the numerical preponderance, including the Federal court, is without a doubt in favor of holding elevators and common carriers to the same liability, yet it appears that the position taken by the courts of New York, Michigan and Rhode Island is far from being unsound or unjust, and in many cases may be conducive to justice.

DEVOTIONAL EXERCISES IN THE PUBLIC SCHOOLS AS INTERFERING WITH RELIGIOUS FREEDOM.

The Constitution of the United States provides that no religious test shall ever be required as a qualification to any office or public trust under the United States. *U. S. Constitution,* Art. VI. It also provides that Congress shall make no law respecting the establishment of religion, or the free enjoyment thereof. *U. S. Constitution,* Amend. I. These provisions do not establish religious freedom within the common meaning of the term. It is not their purpose to secure to every person the right to worship according to the dictates of conscience. They only intend to remove the matter of religion or worship, man's duty to his Creator, from the cognizance of the civil Government. And even in this they go no further than to limit the actions of Congress. They do not undertake "to protect the religious liberty of the people of the states against the actions of their respective State governments." Cooley: *Prin. of Const. Law,* Chap XIII, Sec. 1.

The states, left free to adjust religious liberty as they saw fit, have without exception made provision by constitutional guaran-